

ADVERSE POSSESSION--COMPROMISES AND ESTOPPEL

Colchester Borough Council v. Smith [1992] 2 W.L.R. 728 is still a truly remarkable decision. In the High Court last year, Mr. Tillson was denied title to land by adverse possession because he had concluded a written agreement acknowledging the council's paper title, albeit that this agreement had been concluded more than 12 years after adverse possession had commenced (see [1991] C.L.J. 234). Under the Limitation Act 1980, s. 29(7), the expiry of 12 years should have extinguished the council's title and made the written acknowledgment ineffective, see *Nicholson v. England* [1926] 2 K.B. 93. Ferris J. thought otherwise and Mr. Tillson appealed. Now, by what appears to be a wholly inappropriate analogy, the Court of Appeal has dismissed the appeal.

In the Court of Appeal, although counsel for Colchester reserved his position on certain matters, the case proceeded on the basis that Tillson had indeed completed 12 years' adverse possession prior to the written agreement by which he purportedly accepted the land under a lease. There were no disputed facts. However, all of their Lordships took the view that, because Tillson had entered into the agreement freely, with legal advice and as a result of negotiations that began before the 12 year period had ended, he was bound by a bona fide compromise of a dispute from which he could not later escape. Their authority for this was *Binder v. Alachouzos* [1972] 2 Q.B. 151. In that case, the defendant had agreed in a written compromise with his creditors not to raise a defence under the Moneylenders Acts in any future suit over the monies owed. When the defence was raised in an action for monies due under the compromise, the court upheld the agreement and struck out the defence on the basis that the policy behind the Moneylenders Acts was not negated in that instance by the *inter partes* agreement. Using this as their only authority, and not even attempting to distinguish *Nicholson*, their Lordships sent Mr. Tillson away with his tenancy but not his freehold.

Unfortunately, however, this reasoning is not compelling. First, as Dillon L.J. himself points out, *Binder* is authority for the proposition that a court may uphold a bona fide compromise of fact, even if it appears to be contrary to the motivation behind an Act of Parliament. In *Binder*, the defendant was forced to stand by his acknowledgment that his creditors were not unregistered within the meaning of the Moneylenders Acts, even though those Acts were designed to prevent unregistered moneylending. He had bound himself to an assumed state of facts and could not escape. However, the *Smith* case is not about a compromise of fact; it is about a purported agreement ousting a rule of law, *i.e.* that after 12 years of adverse possession the title of the freeholder is extinguished. If, as the Court of Appeal accepted, Tillson had completed 12 years, the factual element in adverse possession was satisfied. The only

remaining question concerned the operation of statute, and this is still a question of law, just as it was when it was ignored in the High Court.

Secondly, even if it is accepted that in principle a bona fide compromise of a question of law between two parties can take precedence over a statute, where is the pressing policy reason that requires it in cases such as this? Is it really the case that the Limitation Act is to be disregarded because, to use Butler-Sloss L.J.'s citation from *Binder*, "Any other course would cause very great difficulty in the administration of justice"? This is all very well if property law is a species of the law of contract. If it were, the adventurous tenant could contract out of the Rent Acts and the relaxed lessee could waive his right to a "section 146 notice" in the event of forfeiture. Yet, property law is not an arm of contract law; freedom of contract does not oust the need for clear, certain and predictable rules. Indeed, perhaps the most disturbing feature of this case is not that Mr. Tillson was denied title-at least he will have the benefit of a tenancy protected under the Agricultural Holdings Act 1948-nor even that *Smith* sets an unwelcome precedent-we can limit it to cases where the negotiations leading to the written acknowledgment began before the 12 year period expired and where there was full legal advice for the adverse possessor. It is rather that fundamental principles of the law of real property (even those which are statutory) can be disregarded in favour of freedom of contract without any compelling analysis of principle or policy. Hard cases are still making bad law.

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